

- (3) Whether respondent's written request for review was timely filed before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The first issue raised by the respondent is a jurisdictional issue listed in K.S.A. 44-534a, as amended, and grants the Appeals Board jurisdiction to review a preliminary hearing order.

(1) Claimant alleges she bumped her left great toe with a laundry cart on May 1, 1997, while working for the respondent. Claimant testified as she continued to work that day her toe swelled and the pain increased. Finally, claimant told the head nurse on duty she had to leave because she had bumped her toe with the laundry cart and thought she had broken it. Claimant also tried to call her supervisor, Thomas Hall, but was unable to get ahold of him until the next day. Claimant then told her supervisor about the accident. Claimant stayed home and put ice on her foot until Sunday, May 4, 1997. Claimant testified at that time she was in so much pain and discomfort that she could not walk. She contacted a neighbor and the neighbor took her to a local hospital.

Claimant was admitted to the hospital with an initial assessment of gas gangrene of the left foot and hyperglycemia. Claimant gave a history of hitting her foot with a laundry cart at work. Claimant underwent an incision and drainage surgical procedure for the infected left foot on May 5, 1997, May 8, 1997, and May 10, 1997. Claimant was also treated with a regimen of antibiotics. Finally, on May 12, 1997, because the infection was worsening, orthopedic surgeon Michelle A. Klaumann, M.D., amputated claimant's left lower leg below the knee.

Claimant was discharged from the hospital on May 15, 1997, and transferred to a rehabilitation center for intense occupational therapy and physical therapy. Claimant's discharge diagnosis was cellulitis of the left foot, left below-knee amputation, and diabetes mellitus type II. Claimant remained in the rehabilitation center until she was discharged on May 28, 1997, with a diagnosis of left below-knee amputation, secondary to cellulitis, following trauma to the lower extremity and diabetes mellitus.

The Administrative Law Judge found claimant had suffered a left foot injury at work that aggravated a preexisting diabetic condition. He granted claimant's request for temporary total disability compensation, authorized Dr. Michelle A. Klaumann as the treating physician, and ordered all medical expenses paid as authorized medical.

The respondent argues that claimant failed to present credible evidence in the preliminary hearing record to prove that the toe she injured at work caused the amputation of her lower leg. Respondent admits claimant was at work when she bumped her toe with the laundry cart. Accordingly, respondent agrees that claimant's left toe injury occurred in the course of her employment. See Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d

1058 (1995). However, respondent contends there is no causal relationship between claimant's employment and the amputation of her lower leg. Therefore, the amputation did not arise out of claimant's employment with respondent. Respondent asserts there is no medical report in evidence that relates claimant's work-related toe injury to her leg amputation. The respondent points out that the laceration discovered by the consulting physician during his examination, or the natural progression of claimant's diabetic condition are plausible causes for claimant's infected foot and ultimate lower leg amputation.

At the time claimant was admitted to the hospital on May 4, 1997, the admitting record noted claimant was feeling fine, except for the infected foot, and claimant had a history of being healthy. Claimant denied she had injured her foot before this incident. Also, claimant testified after the incident at work she did not sustain any further injury to her foot while she was at home and before she entered the hospital. Claimant further denied that she was previously diagnosed with a diabetic condition and, if she was, she did not have knowledge of the diagnosis. The admitting physician, Donna E. Sweet, M.D., noted that the infection could have caused the hyperglycemia condition.

The Appeals Board finds claimant has presented credible evidence in the preliminary hearing record through her own testimony and the medical treatment records that prove there was a causal relationship between her work-related injury and the necessity for her left lower leg to be amputated. This conclusion is supported by claimant's testimony that she had no pain or discomfort in her left toe until the toe was bumped at work on May 1, 1997. Following that incident, the pain and discomfort in the toe worsened even though she was off work resting the injured foot. The Appeals Board is mindful that the preliminary hearing record contains a report from a consulting physician dated May 4, 1997, that notes the physician, when he or she examined the claimant, found a one centimeter linear lesion that appeared to be a laceration. Respondent points to this finding as a possible cause for claimant's severely infected foot. However, the Appeals Board has carefully examined all the other medical treatment records entered into evidence at the preliminary hearing, which include the initial admission record, and finds none of claimant's treating physicians noted such a finding. Claimant was also questioned about stepping on a tack before she bumped her toe at work on May 1, 1997. Claimant acknowledged this fact but explained she had stepped on a tack but it involved the right foot and not her infected left foot.

(2) Respondent questions the Administrative Law Judge's authority to order respondent to pay temporary total disability benefits and medical expenses incurred before the date claimant filed her application for a preliminary hearing on September 17, 1997. The Appeals Board has found on numerous other occasions that the preliminary hearing statute, K.S.A. 44-534a, as amended, authorizes the Administrative Law Judge, pending a full hearing on the claim, the discretion to make a preliminary hearing award of medical compensation and temporary total disability compensation. Therefore, the Administrative Law Judge did not exceed his jurisdiction and the Appeals Board does not have jurisdiction to review this issue at this juncture of the proceeding.

(3) The claimant, in her brief before the Appeals Board, challenges whether respondent's written request to the Appeals Board for review of the Administrative Law Judge's preliminary hearing Order was filed within ten days as required by K.S.A. 44-551(b)(1), as amended.

The Administrative Law Judge entered the preliminary hearing Order which is the subject of this appeal on November 6, 1997. Thereafter, respondent filed a written request for review before the Appeals Board on November 18, 1997.

The claimant notes that K.A.R. 51-18-2 provides that the effective date of an Administrative Law Judge's order is the day following the day noted thereon. In this case, the effective date would have been Friday, November 7, 1997.

K.A.R. 51-17-1 provides for the time which an act is to be done to be computed by excluding the first day and including the last. However, if the last day is a Saturday, Sunday, or a statutory holiday, then that day also is excluded. Therefore, the claimant argues that the date one would start counting the ten-day period in this case would be November 8, 1997. Accordingly, claimant contends that the tenth day would have been November 17, 1997, and, therefore, the respondent's request for review filed on November 18, 1997, is not timely and the request should be dismissed.

The Appeals Board disagrees with the claimant's method of computing the ten-day period contained in K.S.A. 44-551(b)(1), as amended. Claimant has failed to recognize that effective July 1, 1997, K.S.A. 44-551(b)(1) was amended by the 1997 Kansas Legislature to include the following sentence:

Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

Therefore, in this case, if the intermediate Saturdays, Sundays, and legal holidays are excluded the respondent had until November 24, 1997, to file its request for review before the Appeals Board from the preliminary hearing Order entered by the Administrative Law Judge on November 6, 1997.

The first day one would start counting the ten-day period would be November 10, 1997, because November 8 and 9, 1997, fall on a Saturday and Sunday. November 11, 1997, would not be counted as a day because November 11, 1997, was Veterans Day, a legal holiday. November 15, 16, 22, and 23, 1997, would be dates excluded because they fell on Saturdays and Sundays. When all of the dates are excluded as provided by the amendment, the respondent had until November 24, 1997, to file the application for review. Therefore, the appeal was timely.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 6, 1997, preliminary hearing Order entered by Administrative Law Judge John D. Clark should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

c: James D. Wenger, Clay Center, KS
Wade A. Dorothy, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director